IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER, individually, as representative of the Estate of Korey Stringer, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	CASE NO. C2 03 665 JUDGE HOLSCHUH Magistrate Judge Abel **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Plaintiff's Opposing Brief does not preclude summary judgment in Riddell's favor because she does not adequately, or accurately, address the questions of law before the Court. Set up as a 51-page "battle of the experts," Plaintiff devotes but a few pages to a key dispositive legal issue in this case – whether Riddell had a duty to warn Korey Stringer, a professional football player, at an NFL training camp overseen by professional football coaches, trainers and physicians, of the risk of heat illness if a football helmet and shoulder pads are worn on a hot day. And in those few pages, Plaintiff relies entirely on inapposite case law and testimony that is irrelevant to the question of law before the Court. Her failure to warn claims also fail because she has not produced sufficient evidence that a failure to warn caused Stringer's heat stroke, or that a warning, if given, would have changed what happened at this NFL training camp. Finally, all of Plaintiff's claims fail because there is no competent medical evidence that Stringer's heat stroke was, in fact, caused by his helmet and shoulder pads and not by other factors.

Plaintiff's arguments in support of her design defect claim fare no better; she has yet to provide expert testimony establishing an unreasonably dangerous design defect, and has not offered any evidence of a safer alternative design. Likewise, Plaintiff's implied warranty claim does not survive under Minnesota law given her simultaneous assertion of product liability claims. Plaintiff does not oppose summary judgment on her express warranty claim.

In short, it was Plaintiff's burden to "set forth specific facts showing that there is a genuine issue for trial" to avoid summary judgment; she "had to make a sufficient showing on every essential element of [her] case for which [she] has the burden of proof at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Krenik v. County of La Sueur*, 47 F.3d 953, 957 (8th Cir. 1995); *Wilson v. Southwestern Bell Tele. Co.*, 55 F.3d 399, 405 (8th Cir. 1995). Because she did not, for any of her claims, Riddell is entitled to summary judgment on all claims asserted against it as a matter of law.

I. RIDDELL HAD NO LEGAL DUTY TO WARN

A. No Duty to Warn of Open and Obvious Risks.

It is well-established that "[t]he question of whether a legal duty to warn exists is a question of law for the court – not one for jury resolution." *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (internal citation omitted); *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987). As established in Riddell's summary judgment motion (at 16-19), there is no duty under Minnesota law to warn of open and obvious risks. *Wiseman v. Northern Pac. Ry. Co.*, 7 N.W.2d 672, 675 (Minn. 1943); *Westerberg v. School District No. 792, Todd Cty.*, 148 N.W.2d 312, 317 (Minn. 1967); *Holowaty v. McDonald's Corp.*, 10 F. Supp. 2d 1078, 1084 (D. Minn. 1998) (applying Minnesota law); *Peppin v. W.H. Brady Co.*, 372 N.W.2d 369 (Minn. Ct. App. 1985). In *Holowaty*, the court also held that any "alleged difference in the anticipated degree of danger does not make the risk associated with use of the product any less obvious."

Holowaty, 10 F. Supp. 2d at 1085 (expressly rejecting argument that although plaintiff knew that spilled coffee could cause "reddened skin" and "minor burns," risk of sustaining second degree burns was not open and obvious to her).

In response to the legal issue presented – whether it is an open and obvious risk that wearing a football helmet and shoulder pads on a hot day increases well known heat risks (which plaintiff and her witnesses do ***not*** dispute is open and obvious) – Plaintiff simply ignores *Holowaty*, and argues that the *degree* of risk in this case was not open and obvious to Stringer – *e.g.*, that the open and obvious risk that wearing a football helmet and shoulder pads on a hot day increases well known heat risks does not mean "that the risk of developing heat stroke was obvious, or that Korey Stringer knew or should have known about it." (Pl.'s Opp. Br. at 36.) In support, Plaintiff points to *Germann*, *supra*, and *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004), but neither case applies to an "open and obvious" analysis. In *Germann*, the Minnesota Supreme Court defined the test for foreseeability in determining whether a legal duty exists; that test does not remotely apply to determining whether a risk is sufficiently open and obvious to preclude a duty to warn.[1] The language Plaintiff quotes from *Gray* is from the Court's analysis of the "sophisticated user" defense, which cannot be extrapolated and applied to an "open and obvious" analysis. For the same reason, Plaintiff's reliance on page after page of expert testimony as to whether NFL players will associate helmets and shoulder pads with heat

[1] Seizing on *Germann's* language regarding foreseeability, Plaintiff urges the Court to focus solely on the specific end result (here, a specific diagnosis of heat stroke that caused death) in evaluating knowledge of and obviousness of the risk. As noted, this approach was flatly rejected in *Holowaty*. Under Minnesota law, the issue is knowledge and obviousness of the risk that the product creates, not the most extreme form of harm that might result from that risk. *E.g.*, *Peppin*, 372 N.W.2d 369 (Minn. App. 1985) (analyses focused on knowledge of risk that aluminum will conduct electricity, not on awareness that by conducting electricity it could cause a short circuit leading to a machine descending on and injuring plaintiff's arm); *Hoeg v. Shore-Master, Inc.*, 1994 WL 593919 at *1-2 (Minn. App. Nov.1, 1994, unreported) (attached as Exh. DD to Riddell's Memorandum) (analysis of obviousness of risk focused on "elastic properties of springs" and not on risk of eye injury, noting that "there is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will make fire, dynamite will explode, or a hammer may mash a finger").

stroke (Pl.'s Opp. Br. at 22-31) is misplaced. Knowledge of the *degree* of risk is irrelevant to the "open and obvious" question of law before the Court.

In short, there is no legal duty on Riddell, as the manufacturer of football helmets and shoulder pads, to warn NFL football players of the open and obvious heat risk of wearing football equipment at an NFL training camp on a hot day. Plaintiff's opposing argument about the lack of knowledge of the *degree* of risk fails as a matter of Minnesota law to preclude summary judgment on her failure to warn claim.

B. No Duty to Warn of Known Risks.

As established in Riddell's Motion for Summary Judgment ("Riddell MSJ") at 19-20, there is likewise no duty to warn under Minnesota law if the user knows or should know of the risk of danger. *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 835 (Minn. Ct. App. 1985)[2]; *Minneapolis Soc. of Fine Arts v. Parker-Klein Assoc. Architects*, 354 N.W.2d 816, 821 (Minn. 1984), *overruled on other grounds*, *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). This is particularly so when "the dangers of a product are within the professional knowledge of the user." *Dahlbeck v. Dico Co., Inc.*, 355 N.W.2d 157, 163 (Minn. Ct. App. 1985), *citing Strong v. E.I. Dupont de Nemour Co.*, 667 F.2d 682, 687 (8th Cir. 1981): "The adequacy of a 'warning' cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product . . . ." (internal citations omitted). Here, the evidence of record plainly establishes that the risk of body temperature rising if a helmet and shoulder pads are worn on a hot day was known to the Vikings' trainers, coaches and players. (Riddell MSJ at §§ II.B. and II.C.) In fact, the expert

[2] Plaintiff cites *Willmar* for the proposition that "past experience with a product does not necessarily alert users to all of the dangers associated with the product." But in *Willmar*, the user was using a familiar product in an entirely different and new way; that created new and different risks which caused the accident. *See Willmar*, 378 N.W.2d at 835-36. Here, Stringer was using a helmet and shoulder pads in a normal way consistent with his past usage.

testimony and opinions Plaintiff provides at pages 22-31 of her brief establish that the risk was known not just to the Vikings' trainers, coaches and players, but the entire football community.

Plaintiff responds in two ways, both of which are inadequate to preclude summary judgment. She first argues that the manner in which Mr. Osterman and Mr. Zamberletti responded to Stringer during his heat-related event establishes that they could not have known of the risk of heat illness. (Pl.'s Op. Br. at 44-45.) But the argument ignores the legal standard – "knew or *should have* known" – and impermissibly attributes, with no support whatsoever, a "no knowledge of risk" level to NFL coaches, staff and trainers based on the actions of two individuals during a medical emergency. If Mr. Osterman and Mr. Zamberletti failed to apply their knowledge and education properly in treating Stringer's emergent condition, that does not change what they knew or should have known, or what any of the Vikings' personnel have testified to regarding their personal knowledge of the risk at issue.

Second, Plaintiff manipulates the deposition testimony of one of Riddell's experts (Halstead) in an attempt to establish a conflict between his expert testimony and direct testimony from Vikings' players and personnel (that the risk of elevating body temperature if a helmet and shoulder pads are worn on a hot day was known to them). The attempt fails for two reasons. First, the expert testimony is irrelevant to the question of law before the Court; the line of expert questioning cited at pages 38-39 of Plaintiff's Opposing Brief concerns awareness of the *degree* of risk (heat stroke). As discussed *supra*, that is not the relevant inquiry here. Second, the manner in which Plaintiff selectively quotes from the transcript mischaracterizes the testimony—when the complete answers are read and placed into context, it is clear that Halstead does not

dispute the Vikings' knowledge.[3] In fact, Halstead testified clearly and unequivocally that he believes Vikings' personnel were aware of the risks of heat illness associated with football practice in hot and humid conditions, and were aware that clothing and equipment, including helmet and shoulder pads, increase the player's body temperature on a hot day.[4] *See* Halstead depo. at 143-56.

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[3] When placed into context, the cited testimony does not support Plaintiff's argument. For example, Plaintiff quotes from page 145: "I don't think the athletic trainers were specifically thinking, oh, my goodness, there's a helmet on the field, let's worry about heat stroke…" See Pl.'s Opp. Br. at 38. But Plaintiff omitted the rest of the answer:

"It doesn't work that way. I don't think it should work that way. But I do think that athletic trainers are cognizant of the risk of heat stroke. I think they're very much aware of it, and I think they recognize that if the work load goes up, the risk goes up. And I think they recognize that the equipment adds to the work load." Halstead depo. at 145-56.

[4] When asked in a straightforward manner, Halstead made it clear that he believes the Vikings were aware of the risk:

Q: Do you think heat illness and the risks of it were well understood by the Minnesota Vikings coaches and trainers?

A: Yes, I do.

Q: What is your basis for stating such an opinion as an expert opinion?

A: Sure. Part of it is my daily interaction—I say daily, my almost daily interaction with football teams—maybe it's daily, actually, with football coaches and players and parents. My very frequent interaction with NFL players and coaches, and the actual testimony that I have seen in this case, where they stated they were quite aware of it.

* * *

Q: You say in your report – let me ask it this way. To a reasonable degree of professional certainty in your field, do you believe that the Vikings athletic trainers on July 31, 2001 already knew that the Riddell helmet and shoulder pads subjected Korey Stringer to a risk of heat stroke?

A: I think that the trainers know whenever there's an increase in work load, and helmets and shoulder pads increase work load. And whenever there's a decrease in the potential evaporative effect, and certainly clothing and equipment can decrease that surface area, I think they recognize that those are risk factors.

* * *

Q. Okay. Do you believe the Vikings athletic trainers on July 31, 2001 already knew how to prevent the Riddell helmet from causing Korey Stringer to develop heat stroke?

A: I don't believe the Riddell helmet or any other helmet causes heat exhaustion or heat stroke. I do think trainers are aware of heat-induced illness on the field, including heat exhaustion and heat stroke, and I think they recognize that the more gear the guys were wearing, the more likely that risk is.

Halstead depo. at 143-145, 152-53. (excerpts attached hereto as Exh. "A.")

In response to Defendants' argument establishing Vikings' personnel as sophisticated intermediaries, Plaintiff provides one sentence: "Neither the evidence cited in Riddell's memorandum nor the testimony of Riddell's expert Mr. Halstead discussed above suffice to obviate or discharge Riddell's duty to warn." (Pl.'s Opp. Br. at 39.) That is it; she provides no evidence or specific facts to raise a genuine fact issue, and her reliance on selectively pulled portions of Mr. Halstead's deposition testimony fails for the reasons listed above. Plaintiff's reliance on *Gray* (at 39) is likewise misplaced as the record in that case did in fact establish genuine issues of material fact as to the employer's knowledge level. Not so here.

Application of the sophisticated intermediary doctrine is particularly appropriate in this case because "delegation of the duty to warn makes particular sense where the manufacturer cannot control how the intermediary will use the product." *Taylor v. Monsanto*, 150 F.3d 806, 808 (7th Cir. 1998). Riddell simply cannot control how an NFL coach conducts a professional football training camp for professional football players. All of the training camp decisions that might impact the risk of heat illness – when and where to practice, who should practice, what to do in practice, including what uniform configuration to wear – were all decisions made by the coaches and trainers, all of whom were indisputably aware of the risk of heat illness. Because the risks at issue were known, to the players as well as the coaches and trainers as sophisticated intermediaries, Riddell had no duty to warn as a matter of law.

II. PLAINTIFF CANNOT PROVE CAUSATION SPECIFIC TO HER FAILURE TO WARN THEORY BECAUSE THERE IS NO EVIDENCE THAT A WARNING WOULD HAVE CHANGED BEHAVIOR

When the undisputed facts demonstrate a lack of causation between a failure to warn and the injuries sustained, causation may be decided as a matter of law. *Balder v. Haley*, 399 N.W.2d at 81. In the failure to warn context, proximate cause "focuses on the individual product

user and requires some admissible evidence that the product user would have acted differently had the manufacturers provided adequate warnings." *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 925 (8th Cir. 2004) (plaintiff could not establish proximate cause as a matter of law on failure to warn claim where she failed to present affirmative evidence that her decedent would have refrained from using smokeless tobacco had defendants provided adequate product warnings);[5] *Balder v. Haley*, 399 N.W.2d at 82 (causation issue did not require a jury determination because there was no affirmative evidence that warning would have changed plaintiffs' behavior). *See also Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987) (affirming refusal to instruct jury on failure to warn because the product user presented "no evidence at trial that he would have acted differently had GMC provided a warning" and trial court deduced "no evidence which would reasonably tend to prove that GMC's failure to warn . . . proximately caused his injuries"); *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 276 (Minn. 1984) (if injured plaintiff would not have acted any differently had a warning been given, manufacturer's failure to warn is not the cause of injury).

Plaintiff neither mentions this line of authority nor provides any evidence to establish that Stringer, a professional football player, would have refrained from practicing, or that Vikings' coaches, trainers and physicians would have precluded him from practicing, had there been a warning on the helmet or shoulder pads of the risk of heat illness when practicing football on a hot day in heavy football equipment. In fact, Plaintiff's expert's references to the "warrior mentality" and excessive "motivation" that professional football players have as part of their makeup (Pl.'s Opp. Br. at 31) tend to establish just the opposite – that Stringer and the coaches

[5] As noted in *Tuttle*, Minnesota state courts have not adopted a rebuttable presumption that if a product comes with a warning, the user will read and heed the warning. *Tuttle*, 377 F.3d at 925.

and trainers would likely not have paid any attention to any such warning had there been one on the helmet and shoulder pads.

To avoid summary judgment, Plaintiff must point to specific facts of record affirmatively showing that the presence of a warning on the helmet or shoulder pads would have caused Stringer or the Vikings to alter their behavior on July 31, 2001. She did not. Rather, she simply states that "Stringer's frustration with leaving practice on July 30 does not mean, as a matter of law, that he would [sic] practice on July 31, regardless of any warnings." (Pl.'s Opp. Br. at 43.) This unsupported argument reverses the burden of proof on causation, and is insufficient to preclude summary judgment on the proximate cause element of Plaintiff's failure to warn claim.

III. ALL OF PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE SHE CANNOT ESTABLISH MEDICAL CAUSATION.

It almost goes without saying that if Plaintiff cannot prove that wearing the helmet and shoulder pads were the medical cause of Stringer's heat stroke, all of her claims fail as a matter of law. And that is the case here. Plaintiff concedes that there were multiple factors involved in the development of Korey Stringer's heat stroke. Plaintiff's experts also concede that they ***cannot*** say he would have avoided heat stroke had he ***not*** worn a helmet and shoulder pads that day—because of the other factors involved in the development of Stringer's heat stroke. This is fatal to plaintiff's case.

Minnesota courts have made it clear that "[b]ut-for causation … is still necessary for substantial factor causation because if the harm would have occurred even without the negligent act, the act could not have been a substantial factor in bringing about the harm." *George v. Estate of Baker*, 724 N.W.2d 1, 10-11 (Minn. 2006). To elicit their opinions on this critical issue, Plaintiff's experts were asked a simple question: Would Stringer have practiced safely and

avoided heat illness if he did not wear a helmet and shoulder pads?[6] They admitted that they could not give such an opinion. (Riddell MSJ at II.E.2.) If Plaintiff's experts cannot establish that Stringer would have practiced safely "but-for" his use of Riddell's helmet and shoulder pads, they cannot establish "but-for" causation. And, therefore, Plaintiff's "substantial factor" causation argument as a basis for "causation" fails as a matter of Minnesota law.

Further, Plaintiff's experts' offer no opinion as to why other factors could be excluded as the cause of Stringer's heat stroke.[7] Where there are admittedly several possible factors that caused the injury, in order to establish that any one factor was a "substantial contributing factor" a medical expert ***must*** provide a reasonable basis for excluding other causes:

> …[W]here expert testimony must be solely relied on to show the causal connection between the alleged cause and a certain subsequent result—either disability or death—medical testimony which does nothing more than show a mere possibility, suspicion, or conjecture that such a causal connection exists, **without any foundation for the exclusion of other admittedly possible causes, provides no proper foundation for a finding of causal connection."** *Bernloehr v. Central Livestock Order Buying Company*, 208 N.W. 2d 753, 754-55 (Minn. 1973).[8]

See also Christensen v. Northern States Power Co. of Wisconsin, 25 N.W.2d 659, 660-661 (Minn. 1946); *Anderson v. City of Coon Rapids*, 491 N.W.2d 917, 920-21 (Minn. App. 1992). In *Anderson*, several plaintiffs suffered respiratory injuries allegedly caused by exposure to nitrogen

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[6] "The classic test for determining factual cause is to compare what actually happened with a hypothetical situation identical to what actually happened but without the negligent act." *George*, 724 N.W.2d at 11.

[7] Under Minnesota law, "[i]f the facts furnish no sufficient basis for inferring which of several possible causes produced the injury, a defendant who is responsible for only one of such possible causes cannot be held liable." *Alling v. Northwestern Bell Telephone Co*., 156 Minn. 60, 63-64 (1923).

[8] In *Bernloehr*, the issue was whether certain diseased cattle purchased from defendant were responsible for infecting and subsequently killing the entire herd. Though it was possible that the herd had the disease before the introduction of defendant's cattle, the expert provided an opinion that allowed a jury to exclude other causes. Thus, the court found the testimony sufficient to establish a causal connection. *See Bernloehr*, 208 N.W.2d at 754-55. Here, Plaintiff's experts ***do not*** provide opinions which would permit a jury to exclude other causes.

dioxide in exhaust from a Zamboni machine. There were other possible causes, including pre-existing conditions and history of smoking. The Court granted summary judgment, because plaintiffs' experts could offer no affirmative medical opinions that nitrogen dioxide exposure, and not the other factors, caused the injuries. *Id*. at 921.[9]

In deposition here, Plaintiff's experts admitted that the development of heat stroke depends on multiple factors, and that Stringer was predisposed to developing heat stroke on July 31, 2001 regardless of whether he wore shoulder pads and a football helmet. (Riddell MSJ at II.E.2.) Armstrong testified that there is no way for him to know whether Stringer would have avoided heat stroke had he practiced without a helmet and shoulder pads. Grimaldi admitted it was still "probable or possible" that Stringer would have developed heat stroke without wearing a helmet and shoulder pads. Grimaldi and Mosely testified that Stringer *should not have been practicing at all* in light of all his unique risk factors. (Riddell MSJ at § II.E.2). None of Plaintiff's experts provided any opinion that can be the basis for concluding that it was the helmet and shoulder pads, and not something else, that was responsible for producing Stringer's

[9] In an attempt to soften the standard of required proof, Plaintiff relies on *Osborne v. Twin Town Bowl*, 749 N.W.2d 367 (Minn. 2008). There, in a dram shop case, the court made the unremarkable observation that there can be more than one proximate cause. The court reversed summary judgment because effects of alcohol intoxication were within the knowledge of the jury, thus the jury could assess whether alcohol intoxication was a substantial factor in plaintiff's decision to jump off a bridge into a flooded river despite other possible causes. Here, the jury cannot assess the various risk factors and determine which caused Stringer's heat stroke—expert testimony is required, bringing this case within the rule of *Bernloehr*, *Christenson*, and *Anderson*. *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982), also cited by Plaintiff, does not preclude summary judgment either. Mitchell deals with the issue of apportionment between two tortfeasors in a second collision/enhanced injury case, and whether liability should be jointly or severally applied. That issue is not before the Court.

heat stroke.[10]

In light of the testimony, Plaintiff can only speculate as to the real cause of Stringer's heat stroke. Plaintiff's argument says it all: "All we know is that Riddell's helmet and shoulder pads *were* part of his uniform that day and that, as a result of practicing in that uniform for almost 2 ½ hours, Stringer had developed a heat stroke…" (Pl. Opp. Br. at 43). Placing Riddell's helmet and shoulder pads at the scene does not prove that they were the reason Stringer developed heat stroke. In a case like this one, Plaintiff's experts have to do more than opine that Riddell's products *might* have been the cause; they must show that they were *in fact* the cause. *Lindsay v. St. Olaf*, 2008 WL 223661 at *3 (Minn. App. Jan. 29, 2008, unreported). There is no such evidence here.

IV. PLAINTIFF'S DESIGN DEFECT CLAIM FAILS AS A MATTER OF LAW BECAUSE SHE CANNOT ESTABLISH A DESIGN DEFECT

Plaintiff has not provided expert testimony to establish a design defect in Riddell's helmet or shoulder pads and therefore, summary judgment on that claim is warranted. (Riddell MSJ at 29.) Her suggestion (at 19-20) that the helmet was defective because it did not have vent holes in the crown is just that – a "suggestion," and therefore insufficient as a matter of law to

[10] The Armstrong experiment does not provide a basis for Plaintiff's experts to conclude that Stringer's heat stroke was caused by the helmet and shoulder pads and not by other factors. Armstrong's lab experiment did not re-create what actually happened to Stringer at the Vikings training camp on July 31st 2001. The 10 subjects studying Armstrong's lab experiment exercised continuously on a treadmill; they were not allowed to take multiple breaks like Stringer did. The subjects were not allowed remove their helmets at all; Stringer and Vikings were allowed to, and did. The subjects were denied water, Stringer and the Vikings hydrated at will. There was no breeze in the lab, in contrast to conditions that Stringer experienced on the field. The experiment is completely artificial and says nothing about Stringer's actual experience on July 31, 2001. The "statistical regression analysis" referenced in the Opposition reveals the impact of these artificial conditions: Had Armstrong's subjects continued working, they *all* would have reached 107.6 and they all would have developed heat stroke.

Even so, in the end, Armstrong's lab experiment reveals no measurable difference in the core temperatures between the full uniform group (full football uniform including helmet and shoulder pads) and the partial uniform group (full uniform without helmet and shoulder pads) at the end of their exercise. In fact, at the end of the repetitive box lifting exercise, which Armstrong admits is the portion of the experiment that most closely replicates real football activity, the control group (shorts and t-shirts) had a higher core body temperature than the group wearing helmets and shoulder pads.

establish design defect.[11] She does not even suggest that Riddell's shoulder pads were defectively designed. Plaintiff's attempt to paint Riddell as a manufacturer that does not care about heat dissipation (at 19-21) likewise does nothing to establish defect – it is simply a gratuitous mischaracterization of the evidence of record.[12]

Last, Plaintiff's argument that it is not required to produce evidence of a safer alternative design is misleading. In *Kallio v. Ford Motor Company*, 407 N.W.2d 92 (Minn. 1987), while holding that such evidence is not an element of a design defect claim, the court recognized that "to establish a prima facie case that [the product in question] was unreasonably dangerous normally requires production of evidence of the existence of a feasible, alternative safer design." *Id*. at 96. The court stated that "conceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned." *Id*. at 96-97 n.8. Courts recognize that under *Kallio*, proof of a safer alternative design will almost always be required. *See, e.g., Wagner v. Hesston Corporation*, 450 F.3d 756,

[11] In fact, Riddell's AF-2 helmet was designed to permit air circulation around the head even without vent holes in the crown. *See* Deposition of Thad Ide ("Ide depo.") at 17 (excerpts attached as Exh. "B"), Deposition of Dan Kult ("Kult depo.") at 14 (excerpts attached as Exh. "C"); Halstead depo. at 239-241. Indeed, there is no evidence of record that crown vent holes do anything to improve heat dissipation or otherwise affect body temperature. Studies comparing helmets with and without crown vent holes actually show that excess heat does not accumulate inside the helmet in the absence of crown vent holes. *See* Ide depo. at pp. 30-31; Halstead depo. at 166-67, 227; 231.

[12] Riddell has always considered it a design criteria to make its equipment as comfortable as possible for the wearer, including allowing for air circulation and as a result, heat dissipation. *See* Ide depo. at 15-16; Kult depo. at 37. When Mark Monica pitched an alleged heat dissipating technology, Riddell tested it—it did not work. *See* Kult depo. 21-29. Riddell has tested other heat dissipating technology that did not work either. *See Id.* at 33-35. The testimony cited from Richard Lester reflects the simple truth that heat illness depends on environmental factors, medical issues, and practice decisions. Plaintiff suggests that Lester received annual surveys that directly connected heat stroke to football shoulder pads and helmets—but Plaintiff woefully mischaracterizes these materials. *See* Pl.'s Opp. Br. at 21. In fact, the surveys recognize the risks of heat stroke, and provide much advice about scheduling practice, activity during practice, giving breaks and water, and monitoring player health. Discussion of clothing and equipment addresses the uniform and clothing as a hole, and does not directly connect heat stroke to use of helmets and shoulder pads. In fact, the sole direct reference is that athletes should remove helmets during breaks on hot days (which Stringer and the Vikings already did). These materials make obvious in this case what is obvious to the entire football playing world: prevention of heat stroke is not an equipment issue. It is a coaching and training issue.

761 (8th Cir., 2006) (summary judgment affirmed; where there was no evidence of a safer alternative design and plaintiff did not establish a "rare case" exception, "District Court would have acted properly . . . if it had required the proffered experts to establish the existence of feasible alternative to the Hesston 5600 baler"); *Bruzer v. Danek Medical, Inc.*, 1999 WL 613329 at *5 (D. Minn., Mar. 8, 1999, unreported) ("Because the plaintiffs have not shown that the instant case is one of those 'rare cases' discussed in *Kallio*, in which a plaintiff can show that a device should be taken off the market altogether . . . they must present evidence of an alternative safer design in order to succeed on their claim for design defect."). Plaintiff has not shown or even asserted that this case is one of those "rare cases" where the exception would apply. Without expert evidence of the existence of a safer alternative design, Plaintiff cannot establish that Riddell's helmet and shoulder pads were "unreasonably" dangerous. Her design defect claim therefore fails as a matter of law. Further, the claim fails because she cannot establish causation. See *supra* section III.

V. PLAINTIFF'S IMPLIED WARRANTY CLAIM FAILS AS A MATTER OF LAW

Under Minnesota law, Plaintiff's implied warranty claim is preempted by its product liability claim. (Riddell's MSJ at 30-31.) Plaintiff relies on *Bach v. Gehl*, No. A05-1843, 2006 WL 2865166 (Minn. Ct. App. 2006) to argue that Minnesota courts will still "entertain" implied warranty claims in personal injury cases where products liability claims are also asserted. (Pl.'s Opp. Br. at 50 n. 14.) But the defendants in *Gehl* apparently never raised or argued that the implied warranty theory was preempted, and the court did not address the issue. The cases clearly establish that an implied warranty theory is not valid in this case, and that Riddell is therefore entitled to summary judgment on this claim. (Riddell MSJ at 30-31.) Moreover,

because there is no evidence of a design defect, there simply is no evidence from which a jury could find that Riddell's shoulder pads and helmet are unfit to be used as football protective equipment. Last, as established *supra*, Plaintiff cannot prove that the helmet and shoulder pads caused Stringer's heat stroke.

VI. CONCLUSION

For all of the reasons set forth above, Plaintiff's arguments do not preclude summary judgment in Riddell's favor on all claims asserted against it. Riddell therefore respectfully requests that the Court enter summary judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing **Defendants' Reply Brief in Support of Motion for Summary Judgment** was filed electronically this 19th day of January, 2009 The parties will be notified of this filing through the Court's electronic filing system. All parties have access to the system and can obtain a copy of this Motion.

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